United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2351

To be argued by
WILLIAM EPSTEIN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
MICHAEL HILL,

Petitioner-Appellant,

-against-

VITO TERNULLO, Superintendent,
Elmira Correctional Facility,

Respondent-Appellee.

Docket No. 74-2351

BRIEF FOR PETITIONER-APPELLANT

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
DENYING A PETITION FOR WRIT OF HABEAS CORPUS

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QUESTIONS PRESENTED

1. Whether appellant's guilty plea was voluntary and knowing, and whether there was any factual basis laid for it.

2. Whether the case should be remanded to the District Court for a hearing should this Court find insufficient or contradictory the facts on the record.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Western District of New York (The Honorable Harold P. Burke) dated October 5, 1974, denying without a hearing* a petition for writ of habeas corpus. The District Court granted leave to appeal in forma pauperis, but denied to issue a certificate of probable cause. On October 11, 1974, this Court granted a pro se application for issuance of a certificate of probable cause and assignment of counsel, and assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Prior Proceedings

Petitioner was charged in County Court, Monroe County, State of New York, in two separate indictments, with two counts of robbery in the first degree, one count of grand larceny in the third degree, two counts of attempted robbery in the first degree, one count of attempted grand larceny in the third

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*On the return date of appellant's petition, Judge Burke's only action was to receive a letter from appellant's trial counsel concerning counsel's advice to appellant on the question of possible sentence (Memorandum and Order, October 5, 1974, at 4). A copy of the letter is "D" to appellant's appendix.

degree, and one count of attempted murder. Following plea bargaining between appellant's counsel, Gerald Dorsey, Esq., and the Assistant District Attorney, Raymond Cornelius, Esq., and with the participation of the trial judge, The Honorable George D. Ogden, appellant pleaded guilty on June 29, 1970, to robbery in the second degree, in satisfaction of both indictments. Appellant was sentenced to five to fifteen years' imprisonment, pursuant to McKinney's New York Penal Law §70.00.

On appeal, appellant challenged the validity of his guilty plea. On December 2, 1971, however, the Fourth Judicial Department of the Appellate Division affirmed the judgment of conviction without opinion. (People v. Hill, 38 A.D.2d 689 (4th Dept. 1971)). The New York Court of Appeals denied leave to appeal to that Court.

In his petition for writ of habeas corpus, appellant raised the same challenges to the validity of his guilty plea.

B. The Guilty Plea and Sentencing Proceedings

Following several plea bargaining sessions, an agreement was reached whereby appellant would plead guilty to robbery in the second degree in satisfaction of two indictments charging him with participation in several robberies and with attempted murder, allegedly committed during one of the robberies. At the guilty plea hearing, the entire proceedings consisted of the following questions asked by the Assistant District Attorney:

[MR. CORNELIUS:] I understand from both your counsel that if permitted to do so by Judge Ogden and upon the recommendation of the District Attorney's Office, you would be desirous of entering a plea of guilty to robbery in the second degree, in full satisfaction of the counts contained in Indictment Nos. 222 and 223; is that correct?

DEFT. HILL: Yes, sir.

DEFT. DUKES: Yes, sir.

MR. CORNELIUS: At this time, Your Honor, the People would recommend to the Court that the Court accept a plea of guilty to robbery in the second degree in full satisfaction of the counts contained in both indictments.

We have had several discussions with Your Honor with respect to this case, and the People feel that because of the ages of these defendants and their background, that some consideration should be shown, and in the interest of justice we feel that a plea of guilty to robbery in the second degree would satisfy the interest of justice.

THE COURT: The recommendation is approved.

MR. CORNELIUS: Michael Hill, I now ask you how you plead to the crime of robbery in the second degree, in full satisfaction of the counts contained in Indictment Nos. 222 and 223?

DEFT. HILL: Guilty, sir.

MR. CORNELIUS: Are you entering that plea of guilty after consulting with your attorney and upon his advice and consent?

DEFT. HILL: Yes, sir.

MR. CORNELIUS: Have any threats or any promises been made to you to induce you to plead guilty?

DEFT. HILL: No, sir.

MR. CORNELIUS: You are doing so voluntarily and of your own free will?

DEFT. HILL: Yes, sir.

THE COURT: You realize, Mr. Hill, that you may be sent to prison as a result of your conviction of this crime?

DEFT. HILL: Yes, sir.

THE COURT: Do you realize that?

DEFT. HILL: Yes, sir.

Guilty Plea and Sentencing Hearing, June 29, 1970, at 3-4.

C. The Present Case

In his petition to the District Court, appellant challenged the validity of his guilty plea on the grounds that he was not advised of the consequences of his plea, that he was advised by his attorney that the maximum sentence he could receive was four years in custody in an institution for juveniles, and that no factual basis was laid for the plea.

The State filed no answer. Judge Burke held no hearing and, in addition to the petition and the transcript of the plea and sentencing proceeding, considered only a letter from Mr. Dorsey, appellant's trial attorney, explaining the advice on sentencing he allegedly gave appellant:

> ... To the best of my recollection, at the time Michael Hill was sentenced, there was some confusion, on my part, concerning his sentence. It was my understanding that the sentence was from five to fifteen years. This meant that with good behavior he would be out in two-thirds of the minimum time, or approximately two years. As I recall,

> this is the way it was explained to Michael. Thereafter, as I recollect, there was a change in the law and he was required to serve the full minimum term.
>
> Memorandum and Order, October 5, 1974, at 4.*

On the basis of this letter, Judge Burke concluded that appellant's guilty plea had been validly entered:

> The petitioner appears to assert in this court the eleventh ground asserted in the Appellate Division, viz, the trial court erred by failing to inquire into the facts of the crime to which appellant pleaded guilty. There is no merit to this contention. The transcript of the proceedings at the sentence amply show that the judge was thoroughly familiar with the facts of the crime to which the petitioner pleaded guilty.
>
> The petitioner appears to assert in this court ground twelve of the grounds urged in the Appellate Division, viz, "the trial court, in accepting his plea, failed to advise appellant that he was thereby waiving certain constitutional rights." There is no merit to this contention.
>
> The petitioner appears to reassert here ground thirteen of his Appellate Division claims, viz, that his plea was involuntary because his attorney misinformed him as to the sentence he might receive. This is not a valid claim of infringement of the petitioner's rights under the federal constitution. If the defendant's retained attorney was mistaken as to the sentence the petitioner might receive as a result of his guilty plea, and it is not clear from the letter from Dorsey to Barrett that he was misinformed, that does not amount to an infringement of the petitioner's rights under the federal constitution.
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> Id., at 6-7.

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*The Memorandum and Order is "C" to appellant's separate appendix.

ARGUMENT

Point I

APPELLANT'S GUILTY PLEA WAS NOT VOLUNTARY AND KNOWING, AND NO FACTUAL BASIS WAS LAID FOR THE GUILTY PLEA.

A. Failure to Advise Appellant of his Sixth Amendment Rights

Appellant was charged in two indictments with participation in several robberies and with attempted murder. Plea bargaining among defendant's counsel, the Assistant District Attorney, and the trial judge,* resulted in an agreement whereby appellant would plead guilty to robbery in the second degree in full satisfaction of both indictments. The guilty plea hearing consisted in its entirety of the following questions by the Assistant District Attorney and the Court, and responses by appellant:

> [MR. CORNELIUS:] I understand from both your counsel that if permitted to do so by Judge Ogden and upon the recommendation of the District Attorney's Office, you would be desirous of entering a plea of guilty to robbery in the second degree, in full satisfac-

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*Judge Ogden's participation in the plea bargaining process is indicated by a remark made by Cornelius at the time of the guilty plea, "We have had several discussions with Your Honor with respect to this case" (Tr. 3), and by a remark made by James Iannuzo, Esq., who substituted for Dorsey as appellant's counsel at the plea and sentence hearing, "... Your Honor and Mr. Dorsey have discussed this extensively" (Tr. 7).

tion of the counts contained in Indictment Nos. 222 and 223; is that correct?

DEFT. HILL: Yes, sir.

DEFT. DUKES: Yes, sir.

MR. CORNELIUS: At this time, Your Honor, the People would recommend to the Court that the Court accept a plea of guilty to robbery in the second degree in full satisfaction of the counts contained in both indictments.

We have had several discussions with Your Honor with respect to this case, and the People feel that because of the ages of these defendants and their background, that some consideration should be shown, and in the interest of justice we feel that a plea of guilty to robbery in the second degree would satisfy the interest of justice.

THE COURT: The recommendation is approved.

MR. CORNELIUS: Michael Hill, I now ask you how you plead to the crime of robbery in the second degree, in full satisfaction of the counts contained in Indictment Nos. 222 and 223?

DEFT. HILL: Guilty, sir.

MR. CORNELIUS: Are you entering that plea of guilty after consulting with your attorney and upon his advice and consent?

DEFT. HILL: Yes, sir.

MR. CORNELIUS: Have any threats or any promises been made to you to induce you to plead guilty?

DEFT. HILL: No, sir.

MR. CORNELIUS: You are doing so voluntarily and of your own free will?

DEFT. HILL: Yes, sir.

THE COURT: You realize, Mr. Hill, that you may be sent to prison as a result of your conviction of this crime?

DEFT. HILL: Yes, sir.

THE COURT: Do you realize that?

DEFT. HILL: Yes, sir.

Guilty Plea and Sentencing Hearing, June 29, 1970, at 3-4.

These questions asked by the Assistant District Attorney were inadequate to guarantee that appellant, seventeen years old at the time of the plea, and lacking any prior experience with the law, entered his plea with the knowledge and understanding of the rights he was giving up:

> ... A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. [Citations omitted].

McCarthy v. United States, 394 U.S. 459, 466 (1969), made applicable to state court proceedings by Boykin v. Alabama, 395 U.S. 238, 243 (1969). Emphasis in the original.

Moreover, as the Supreme Court noted in Boykin v. Alabama, supra, the absence of a detailed explanation of a defendant's

Sixth Amendment rights negates any inference of waiver of these rights from the defendant's general statements of his willingness to plead guilty:

> ... We cannot presume a waiver of these three important rights from a silent record.
>
> Id., 395 U.S. at 243.

Here, the record fails to reveal that appellant was made aware of his Sixth Amendment rights prior to trial by his attorney or at any in-court hearing by the judge, Assistant District Attorney, or his attorney.

B. Failure to Advise Appellant Adequately of the Sentence Consequences of his Plea

In his petition for writ of habeas corpus appellant alleged that his counsel told him the following about the possible maximum sentence he could receive:

> Petitioner was told by his lawyer (private) that the maximum amount of time he would receive was four years in the Elmira Reformatory [i.e., as a juvenile offender].
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> Petition, at 3.*

However, Judge Burke failed to resolve the issue raised by appellant's allegation. The Judge's only inquiry was to

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*Appellant states that his surprise at receiving the five to fifteen year sentence put him in a "semi-state of shock," although he surmises that, unknown to him, Dorsey did bargain for that sentence (Petition at 3-4).

receive the following letter from Dorsey:

> ... To the best of my recollection, at the time Michael Hill was sentenced, there was some confusion, on my part, concerning his sentence. It was my understanding that the sentence was from five to fifteen years. This meant that with "good" behavior he would be out in two-thirds of the minimum time, or approximately two years. As I recall, this is the way it was explained to Michael. Thereafter, as I recollect, there was a change in the law and he was required to serve the full minimum term.
>
> Memorandum and Order, October 5, 1974, at 4.

On the basis of this letter, Judge Burke concluded that Dorsey might have misinformed appellant as to the sentence appellant could have received, but that that misinformation did not render the plea invalid.

> The petitioner appears to reassert here ground thirteen of his Appellate Division claims, viz, that his plea was involuntary because his attorney misinformed him as to the sentence he might receive. This is not a valid claim of infringement of the petitioner's rights under the federal constitution. If the defendant's retained attorney was mistaken as to the sentence the petitioner might receive as a result of his guilty plea, and it is not clear from the letter from Dorsey to Barrett that he was misinformed, that does not amount to an infringement of the petitioner's rights under the federal constitution.
>
> Memorandum and Order, October 5, 1974, at 7.

The Judge's opinion is clearly erroneous.

If Judge Burke interpreted Dorsey's letter to mean that appellant was only advised that after pleading guilty to robbery he could receive a maximum of four years' imprisonment

as a juvenile offender, and that the advice about the five to fifteen year sentence occurred at or after sentencing, then the plea was unknowing because it was made in "ignorance of what the possible maximum sentence was." United States ex rel. Leeson v. Damon, 496 F.2d 718, 721 (2d Cir. 1974). If, on the other hand, Dorsey's letter was interpreted to mean that Dorsey advised appellant of the five to fifteen year sentence possibility, but that appellant could be released in two years by serving two-thirds of his minimum sentence minus "good time" credit, then appellant's plea was still unknowing because Dorsey was in error about the possibility of appellant's release prior to service of the five year minimum.*

Under New York law, a person sentenced under Penal Law §70.00 to a maximum-minimum sentence must serve the entire minimum before becoming eligible for parole. See McKinney's New York Penal Law §70.00, Practice Commentary at 122; §70.30 [4] and comments thereunder. Moreover, this rule became effective in 1967, three years prior to this case, contrary to the seeming assertions in Dorsey's letter that the law was changed after he explained the maximum-minimum requirements to appellant. Thus, when appellant entered his plea of guilty, he was, under the facts apparently accepted by Judge Burke,

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*Dorsey had to have advised appellant, if he did at all, of the five to fifteen year sentence possibility and the parole eligibility in two years, before or after the plea. Dorsey was absent from court on the date of the plea and sentencing, at which time appellant was represented by James Iannuzzo, Esq., an associate of Dorsey's.

under the misapprehension that he would be eligible for parole in forty per cent of the correct minimum time.

Dorsey's advice that appellant could be paroled in two years was wrong as a matter of law:

> ... Although counsel need not be a fortune teller, he must be a reasonably competent legal historian. Though he need not see into the future, he must reasonably recall (or at least research) the past -- and today the past surely encompasses the present.
>
> Cooks v. United States, 461 F.2d 530, 533 (5th Cir. 1972).

By relying on Dorsey's advice, appellant was forced to make his plea choice under the misapprehension that the sentence possibilities were much more favorable than they actually were. This situation contrasts sharply with cases where an attorney makes a sentence prediction which results in a disappointed expectation of leniency. Mosher v. LaVallee, 491 F.2d 1346, 1347-1348 (2d Cir. 1974) (dictum); United States ex rel. Bullock v. Warden, 408 F.2d 1326, 1330 (2d Cir. 1969), cert. denied, 396 U.S. 1043 (1970); United States ex rel. McGrath v. LaVallee, 319 F.2d 308, 314 (2d Cir. 1963). Here, to appellant's prejudice, the advice was actually legally incorrect, rather than merely underestimated.

Thus, whether Judge Burke found that appellant was incorrectly advised of the possible maximum of his sentence, four years in a youth correctional facility as appellant claims, or whether appellant was incorrectly advised of the possible

minimum, as Dorsey claims, appellant made his plea ignorant of the consequences of his choice. Under either version of the facts, he was subject to more prison time -- eleven years under appellant's allegations, and three years under Dorsey's assertions -- than he believed at the time he pleaded guilty.

C. Failure to Lay a Factual Basis for the Plea

The plea was also inadequate because no factual basis was laid for it. In North Carolina v. Alford, 400 U.S. 25, 38 (1970), the Supreme Court held that a judge may accept a guilty plea, even despite protestations of innocence, if there is a strong factual basis for the plea and if the defendant is desirous of pleading guilty. See also United States ex rel. Dunn v. Casscles, 494 F.2d 397, 400 (2d Cir. 1974). Here, the only thing asked of appellant was how he wished to plead to the charge of robbery in the second degree, to which he replied, "Guilty, sir." (Transcript, 3-4). No facts from any source were introduced, other than the trial judge's statement during sentencing that appellant had struck a man during a robbery, nor was appellant asked, as were Alford and Dunn, to explain his actions.

In his opinion, Judge Burke recognized the necessity for the existence on the record of a factual basis for the plea, but, despite the virtually silent record, ruled that a factual

showing had been made:

> The transcript of the proceedings at the sentence amply show that the judge was thoroughly familiar with the facts of the crime to which the petitioner pleaded guilty.
>
> Memorandum and Order, October 5, 1974, at 6.

Contrary to Judge Burke's ruling, it was necessary to place the factual basis on the record in order to preserve the integrity of the judicial process by showing the facts validating the plea to avoid later challenges to the plea. McCarthy v. United States, supra, 394 U.S. at 467; United States ex rel. Dunn v. Cassclen, supra, 494 F.2d at 399-400.

Point II

THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR A HEARING SHOULD THIS COURT FIND INSUFFICIENT OR CONTRADICTORY THE FACTS ON THE RECORD.

The law of this Circuit is that a hearing on a claim for collateral relief is required unless a petition contains allegations "insufficient in law, undisputed, immaterial, vague, conclusory, palpably false or patently frivolous." United States v. Malcolm, 432 F.2d 809, 812 (2d Cir. 1970). See also Dalli v. United States, 491 F.2d 758, 760-761 (2d Cir. 1974); Taylor v. United States, 487 F.2d 307, 308 (2d Cir. 1973). Here, despite appellant's meritorious petition, Judge Burke limited his attempts to learn what had occurred to the reception of Dorsey's letter.

Dorsey's letter and Judge Burke's opinion left vague certain important facts: whether appellant was advised at all prior to his guilty plea of the possibility of a five to fifteen year sentence or whether he was so advised but told that he could be eligible for parole in two years. Although appellant is entitled to relief under either version of the facts (see Point I, supra), should this Court wish to refrain from a decision until the facts are resolved, a remand would be appropriate.

CONCLUSION

For the above-stated reasons, the order below should be reversed and the writ issued with a direction to the State that appellant be released unless he is retried; alternatively, the case should be remanded to the District Court for a hearing.

Respectfully submitted,

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WILLIAM EPSTEIN,
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November 18, 1974

Certificate of Service

NOV 18, 1974

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

William Gaston